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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

Nos. 76 and 77.

THE MAYTAG COMPANY,

Petitioner,

vs.

HURLEY MACHINE COMPANY and ELECTRIC HOUSEHOLD UTILITIES CORPORATION,

Respondents.

THE MAYTAG COMPANY,

Petitioner,

vs.

EASY WASHING MACHINE CORPORATION,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM H. DAVIS,
DEAN S. EDMONDS,
CHARLES W. RILEY,
for Respondents.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

These are suits in equity brought by petitioner against respondents in the District Court for the Southern District of New York for alleged infringement of patent 1,866,779, granted July 12, 1932, on an application of Howard F. Snyder, filed June 14, 1922.

Prior to the trial of these suits, the patent had been held invalid by the Court of Appeals for the Second Circuit in *Maytag Company* v. *Brooklyn Edison Company*, 86 F. (2d) 625. This Court denied a petition for certiorari. *Maytag Company* v. *Brooklyn Edison Company*, 300 U. S. 662.

In the *Brooklyn Edison* suit, petitioner relied upon claim 38, which defines the method of washing clothes described in the patent, and upon claims 23 and 26, which define a washing machine for practicing the method. Claim 38 was held invalid upon the ground that the method was old. Claims 23 and 26 were also held invalid because anticipated by what was disclosed in prior patents and machines of the same type.

In the present suits, petitioner again relies upon claims 23 and 26, and asserts also claim 29, another machine claim which does not differ substantially from claims 23 and 26 (R., III, 1460).*

The District Court, upon full hearing, found (R., III, 1412, 1414, 1435, 1437) that the evidence presented by plaintiff in the cases at bar did not differ in substance from the evidence submitted to the Court of Appeals for the Second Circuit in the *Brooklyn Edison* suit, and that claims 23, 26, and 29 are anticipated by the Davis patent 1,240,826, the Doughty & Davis patent 1,496,305, commercial machines made under said patents by the Nineteen Hundred Company, of Binghamton, New York, and by the Jardine British patent 18,202, of 1891.

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*Following the denial of a writ of certiorari, petitioner filed in the Patent Office a disclaimer of claim 38, and also disclaimed claim 1, which defines the same method (R., I, 46-48).

Petitioner appealed from the decrees entered by the District Court and on final hearing of the appeal the Circuit Court of Appeals for the Second Circuit affirmed the decrees (R., III, 1461). In concluding its opinion the Court said (R., III, 1461):

> "After a full oral argument, a study of the new briefs submitted by the appellant, and after observing a demonstration of the machines, we are of the view that our former determination was correct. We must therefore affirm the decrees and do so upon the authority of Maytag Co. v. Brooklyn Edison Co., supra."

In the period intervening between the decision of the Court of Appeals for the Second Circuit in the *Brooklyn Edison* case and the decision in the instant cases, a decision holding the same claims that are involved in the present suits valid and infringed was rendered by the District Court for the Western District of Missouri in the case of *The Maytag Company* v. *General Electric Supply Corporation* (see Appendix to Petitioner's Brief herein, pp. 1-12 and 13-16).* An appeal from the decree entered in that suit

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*Referring to this decision, Judge Manton, speaking for the Court of Appeals of the Second Circuit in the instant cases, said (R., III, 1460-61):

> "Since our decision in Maytag Co. v. Brooklyn Edison Co., Inc., supra, Judge Otis of the District Court for the Western District of Missouri has rendered a decision (Maytag Co. v. General Electric Supply Corporation, —— Supp. ——) contrary to our views, holding the claims here in suit valid and infringed. In that decision he expressed a willingness 'to make some contribution to the final decision,' but, upon examination of what he wrote, we discover no contribution to cause us to change the views expressed in the previous litigation in this circuit as to the invalidity of this patent."

has been taken to the Circuit Court of Appeals for the Eighth Circuit and it is expected that the appeal will be heard during the coming Fall.

Another suit brought for alleged infringement of the patent is now pending in the United States District Court for the District of Delaware. This suit (*Apex Mfg. Co. et al* v. *The Maytag Co.*) was brought under the Federal Declaratory Judgment Act to have the claims of the patent declared invalid or not infringed. The case is now at issue on The Maytag Company's answer and counter-claim. The counter-claim is for infringement of the patent.

The Questions Presented on the Petition.

The three reasons urged by petitioner for granting *certiorari* are set forth at pages 8 to 10 of the petition. They will be considered here in the order in which they are there advanced.

I.

The first reason advanced by petitioner is the existence of conflict between the decision of the Court of Appeals for the Second Circuit in the instant cases and the decision of the District Court for the Western District of Missouri. Ordinarily, at least, such a conflict is not an adequate reason for granting the writ. Such a conflict does not present the embarrassing situation created by a conflict of decision between two courts of equal rank. A decision of a District Court of another Circuit in conflict

with a decision of a Circuit Court of Appeals whose decision is sought to be reviewed is to be considered as overruled or disapproved by a more authoritative tribunal. The conflicting decision of the District Court for the Western District of Missouri has been expressly disapproved in the instant cases (R., III, 1460-61).

There is nothing in the instant cases to take them outside the general rule restricting the grant of the writ to cases involving conflicts of decision between two Circuit Courts of Appeals. They are ordinary patent cases involving the usual issues of validity and infringement. The controversy touches no public interest. No important question of patent law is involved.

The suggestion is made by petitioner (Petition, pp. 8, 9, 13-14) that *if* the decision of the District Court for the Western District of Missouri should be sustained on the pending appeal by the Circuit Court of Appeals for the Eighth Circuit, and *if* this Court, in view of the conflict that would then exist between two Circuit Courts of Appeals with respect to the validity of the patent, should grant *certiorari*, and *if* this Court should then sustain the validity of the claims in controversy, respondents would have immunity by virtue of the decrees entered in these cases while others would be forced to pay tribute to the patent. So far as we are aware such possibilities, present in all cases where litigation is proceeding in different circuits, have never moved this Court to depart from the general rule that review in ordinary patent cases should await the appearance of conflict between Circuit Courts of Appeals.

II.

The second point urged as a reason for granting *certiorari* is that the Court of Appeals for the Second Circuit departed from established principles of review in refusing to approve the findings of the trial judge in the *Brooklyn Edison* case (Petition, p. 9). This point merits but little discussion. It amounts to no more than an assertion that the Court of Appeals erred in holding the claims in controversy invalid in the *Brooklyn Edison* case. So far as concerns the findings of the trial judge in the instant cases there can be no complaint, for those findings with respect to the anticipatory effect of the prior patents and machines were approved.

III.

The third point advanced as a reason for granting *certiorari* is that the Court of Appeals for the Second Circuit held the patent invalid for anticipation by prior patents which fail to disclose the subject matter of the claims in controversy, and thus rendered a decision in conflict with decisions of other courts holding that "a patent is to be measured as anticipatory not by what might have been made out of it, but by what is clearly and definitely expressed in it" (Petition, pp. 9-10). The petition and supporting brief contain no argument in support of this asserted conflict. It remains a mere assertion. At best, it is nothing more than a statement that the Court of Appeals erred in holding the claims of the patent anticipated.

CONCLUSION.

The reasons asserted for granting *certiorari* are without merit. The petition should be denied.

Respectfully submitted,

WILLIAM H. DAVIS,
DEAN S. EDMONDS,
CHARLES W. RILEY,
for Respondents.